87-437

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD PINKNEY, *et al.*,
Petitioners,

v.

DOW CHEMICAL CO., *et al.*,
Respondents.

In re "Agent Orange" Product Liability Litigation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the courts below erred in holding that diversity jurisdiction exists, without complete diversity between all plaintiffs and all defendants, in a situation in which prior to the Federal Rules of Civil Procedure diversity jurisdiction did not exist, thus ruling that the federal rules have worked an expansion of federal court jurisdiction contrary to assurances given to Congress, Fed. R. Civ. P. 82, and rulings of this Court.

II. Whether the courts below erred in holding that, upon the grant of partial summary judgment in favor of one, but not all, defendants the courts' ruling is not interlocutory despite the lack of any Fed. R. Civ. P. 54(b) certificate (or a certificate that fulfills the requirements of that rule), and thus the defendant in whose favor partial summary judgment was granted ceases to be a party for the purposes of diversity — despite the fact that the court, until the end of the case (or until the requirements of Rule 54(b) are fulfilled), retains the jurisdiction to revise or recant its partial summary judgment ruling.

III. Whether the courts below erred in holding that an order of notice to a Fed. R. Civ. P. 23(b)(3) plaintiff class is valid under principles of due process and this Court's holding in *Phillips Petroleum v. Shutts*, in an action for individual tort damages:

(a) When that order does not require individual notice to each member of the class who is findable with some effort and expense and when the order provides for publication notice that is inadequately designed to reach a substantial portion of the class.

(b) When the order is not carried out (i) in that 177,426 class members whose names and addresses were in the hands of class counsel were sent no notice at all, (ii) when 57,000 notices were missent because of computer gliches, etc., and returned, no attempt was made to correct the problem and resend the returned notices, and (iii) where the publication or-

dered by the Court was not made or was made too late for class members to opt-out.

IV. Whether the courts below erred in holding that, in a plaintiff-class action for money damages, there is personal jurisdiction over involuntary members of the class throughout the United States and in foreign countries who have had no contact with the forum state and where the requirements of due process set forth in *Phillips Petroleum v. Shutts* are blatantly violated.

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PARTIES BELOW

By various estimates, there are over two hundred and seventy thousand (270,000) members of the class as ultimately certified by the district court below. Of those, it is impossible to determine and include a list of the class members who object to the class certification as required by Rule 28.1.

Richard Pinkney has been chosen as the named party since he is typical of those class members who objected to class certification.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, members of the Agent Orange class who object to the class action certification and settlement, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 21, 1987.

OPINIONS BELOW

The Opinions of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) are reported at 100 F.R.D. 718 and 597 F.Supp. 740 and are reprinted in the Single Appendix submitted with this petition at p.456a and p.135a, respectively.

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 818 F.2d at 145 and is reprinted in the Single Appendix submitted with this petition at p.676a.

The Order of the Court of Appeals for the Second Circuit denying the class members' petition for rehearing was issued on June 5, 1987 and is reprinted in the Single Appendix submitted with this petition at p.778a.

The Orders of the Court of Appeals staying the issuance of the mandate pending petition for a Writ of Certiorari are printed in the Single Appendix submitted with this petition at p.780a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The decision of the court below was issued on April 21, 1987. A timely Petition for Rehearing *En Banc* was filed, and was denied on June 5, 1987. On July 17, 1987, the Court of Appeals stayed the issuance of the mandate until August 7, 1987, on the condition that a petition for Writ of Certiorari be filed on or be-

fore that date. On August 7, the Court of Appeals continued the stay of the issuance of the mandate until such time as the United States Supreme Court rules on the petition for certiorari.

STATUTES AND RULES INVOLVED

The statute, 28 U.S.C. § 1332, and the Federal Rule of Civil Procedure 23 involved are appended to this petition.

STATEMENT OF THE CASE

This "Agent Orange" case, one of the largest, if not the largest, class action ever certified, began as many separate suits in a number of state and federal courts around the country. The cases were brought by veterans, spouses and children of veterans, and estates and survivors of deceased veterans against several chemical companies who manufactured and sold to the federal government a chemical compound known as Agent Orange, which contained the toxic chemical dioxin among other ingredients. Each plaintiff claimed injuries due to exposure to Agent Orange. The general gravamen of the tort actions was that the chemical companies knew of the toxicity of Agent Orange but failed to advise the federal government of the danger within their knowledge.

Each of the federal cases was transferred for pretrial purposes to the Eastern District of New York under the Multidistrict Litigation Statute, 28 U.S.C. § 1407. They were first assigned to Judge George Pratt and later to Chief Judge Jack Weinstein. At first, Judge Pratt had ruled that he had federal question jurisdiction. *In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.), *rev'd,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 980 (1984). (App. 1a.) That ruling was reversed by the Second Circuit, which held that the case could be in federal court, if at all, under the diversity of the citizenship jurisdiction of that court. *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 980 (1984). (App. p. 641a) The case was remanded and Chief Judge Weinstein formally certified the class. *In re "Agent*

Orange" Product Liability Litigation, 100 F.R.D. 718, *mandamus denied sub nom., In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (2d Cir.), *cert. denied,* 465 U.S. 1067, 104 S.Ct. 1417 (1984). (App. p. 456a)

Trial was scheduled for May 7, 1984. Notice to class members was not initiated until after March 9, 1984. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 756 (E.D.N.Y. 1984). (App. p. 165a) The deadline for opting out was May 1, 1984. On the eve of trial, Plaintiffs' Management Committee ("PMC") and the defendants agreed to a proposed settlement. A fund of $180,000,000 was proposed to be set up to be distributed among the class members in accordance with a distribution scheme still to be agreed upon.

Fairness hearings were held in five cities over a total of eleven days. The hearings were of a non-evidentiary nature. No examination of the proponents of the settlement was permitted. Judge Weinstein thereupon preliminarily approved the settlement, 597 F.Supp. 740, (App. p. 135a), and on May 28, 1985, approved a distribution plan.

The defendant chemical companies had vigorously opposed the class certification from the time of the first application up to the time that the settlement was reached. At least by June or July 1984, certain non-PMC counsel for plaintiffs also moved to have the class action certification vacated. On July 5, 1984, some of the non-PMC counsel moved to have a subclass of objectors certified, to have counsel appointed for that subclass, and to conduct discovery as to the fairness and adequacy of the settlement. The motion was was denied. *Id.* at 757 (App. p. 167a).

Non-PMC counsel for class members objected to the class action on various grounds, including lack of subject-matter jurisdiction, lack of personal jurisdiction, lack of an order directing adequate notice to satisfy either the requirements of Federal Rule 23(c) or of due process, failure on the part of PMC counsel to furnish even the inadequate notice ordered by the District Court, error on the part of the District Court in creating "national consensus

law" in order to avoid the problems posed by the differing laws of the various states, and other grounds going to the procedure and fairness of the approval of the settlement. All objections were overruled and all motions containing the objections were denied.

After all timely filed motions for reconsideration were denied, notices of appeal were timely filed. On April 21, 1987, the United States Court of Appeals for the Second Circuit affirmed on each of the issues going to the jurisdiction of the district court, the validity of the class action, and the settlement (with one exception not relevant to this Petition). Timely filed petitions for rehearing were denied on June 5, 1987.

REASONS FOR GRANTING THE WRIT

Preliminarily, it should be noted that this petition for a writ of certiorari is one of at least three that have been or are being filed in this matter. One of the additional petitions is being filed by persons who were able to opt-out of the class. A word needs to be said about that petition and how it relates to the instant petition.

There were almost 2,000 class members who opted out of the class action and did not rejoin under the provisions of the settlement. In many of those cases, Judge Weinstein granted summary judgment for the defendants on grounds common to all class members. Upon timely appeal, the Second Circuit affirmed.

Should this Court grant the instant petition and reverse, but deny the petition filed by the opt-outs, the settlement would be set aside and, depending upon the grounds of reversal, there would be a strong possibility that the class action certification itself would be vacated. All the federal cases assigned to Judge Weinstein under the Multidistrict Litigation Statute would continue to pend before Judge Weinstein and would be ripe for the grant of summary judgment for the defendants. Therefore, a grant of the instant petition with a denial of the opt-out petition would be a Pyrrhic victory, accomplishing nothing as far as the instant petitioners are concerned. For these reasons, the instant petition is conditional

upon the grant of the petition filed by the opt-outs on this day.[1] Should the opt-outs' petition be denied, the instant petition is withdrawn.

The Issues Before This Court. The instant case is of a magnitude and complexity unlike any other. The number of claims, the severity of the claimed injuries, the sympathy for those involved, the amount of money involved, the complexity of the issues, both factual and legal, and the real and potential drain upon judicial resources make this case in many respects *sui generis*. The District Court was brilliant in cutting through a tremendous dispute in a most efficient manner. That court created new law where new law achieved an efficient result.

Yet, in achieving this efficiency, fundamental values, statutory restrictions, and holdings of this Court have been swept aside. The District Court created subject-matter jurisidction where there was none before, ignoring the assurance given Congress that the rule-making power would not be used to extend federal court jurisdiction. The court reached throughout the United States, Australia, and New Zealand to sweep into its power persons lacking contact with New York, wiping out their individual causes of action. The District Court's efficient result was at a cost of due process: claims and rights wiped out without notice, or with notice that was inadequate and too late to constitute notice. The court even ignored the fact that its own notice order was not carried out. The cost is best seen in notice given in an April 30th *Time Magazine* and a May 1 *USA Today* with the opt-out period ending May 1st; of one-third of all written notices undelivered because of error; of governors invited to send lists of veterans and then notices not sent to names furnished; of 177,496 names and addresses in hand of veterans exposed to Agent Orange to whom notice was never sent; and of veterans who, seven weeks before the expiration of the opt-out period, telephoned an "800" number only to be told to call back four weeks later.

[1] Of course, there is always a risk that, if both petitions are granted, this Court may agree with one or more of the arguments for reversal raised by the instant petitioners and reject all argument for reversal raised by the opt-out petitioners. That risk is recognized and taken.

Efficient, yes, but in terms of a due process heretofore unknown. Efficiency that asked for reactions to a settlement proposal that was not yet developed and known, and swept aside objections on those grounds. Efficiency that swept aside *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and resurrected *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) for diversity cases where it would be inefficient to worry about the vagaries of state law, creating a new body of law, to be known as "national consensus law," which most efficiently will be whatever the federal trial judge deems in a difficult case.

Each of these District Court rulings was affirmed by the Court of Appeals. If this case stands, we may expect more judicial efficiency. But we will also see the concept of complete diversity swept away whenever there is a group large enough for a class action. The jurisdictional amount requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) will no longer stand in the way of the efficient use of federal court power. A federal court will be able to sweep into its power the individual rights, claims, and property of persons wherever they may be in the world, and terminate them. Finally, the federal case books will be replete with federal judges writing of "national consensus law" whenever it helps resolve difficult problems.

This introduction is by way of emphasizing that the issues in this case are of vast significance. To achieve a brilliantly efficient result, the courts below cut through much of what we thought was law. If allowed to stand, this case will not remain isolated by itself; the era of federal court power will be just beginning.

I. THE COURTS BELOW ERRED IN RULING THAT FED. R. CIV. P. 23 HAS EXPANDED FEDERAL DIVERSITY JURISDICTION CONTRARY TO THE LIMITATION OF THE RULES ENABLING ACT.

This is a diversity case. Yet, complete diversity does not exist between all members of the plaintiff class and the defendants.[2]

[2] There are over 246,000 claims filed, coming from every state and the District of Columbia. It is manifest that complete diversity does not exist.

When Congress, in the Enabling Act, 28 U.S.C. § 2072, gave this Court power to promulgate rules of procedure for the federal courts, it was clearly understood that Congress did not bestow power to extend the jurisdiction of the federal courts:

> Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.

Snyder v. Harris, 394 U.S. 332, 341–42 (1969); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1942).[3]

In the instant case, the courts below violated these limits. They used a federal rule to expand federal jurisdiction where it did not exist in 1938, when the Federal Rules were first promulgated. No matter how desirable this expansion may be, such action goes beyond the power of the courts.

A. The Courts Below Used the Federal Rules to Expand Diversity Jurisdiction Beyond Where It Existed in 1938.

The doctrine of complete diversity. It is well established that in a diversity case there must be complete diversity between all plaintiffs and all defendants. *State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523 (1967); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Various attempts have been made to carve out court-made exceptions. But these attempts have been rejected, most recently in *Owen Equipment & Erection Co. v. Kroger*, 347 U.S. 365, 377 (1978).

The class action device. Prior to 1938, the instant class action could not have been brought in federal court. Class actions

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[3] This understanding was then, and remains, embodied in Rule 82: "These rules shall not be construed to extend or limit the jurisdiction of the United States district court . . . ."

were a device of equity, *see* Wright & Miller, *Federal Practice & Procedure*, § 1751 at 503–09 (1972), embodied in Federal Equity Rule 38, 226 U.S. App. 11:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

The first significant class action, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), concerned a class suit brought to determine the proper allocation between classes of beneficiaries and ultimate disposition of trust funds held by a fraternal benefit association. The lower court termed this a "true class suit" presenting questions common to all members of the class. *Id.* at 361. The named representative parties were from states other than Indiana; the defendants were Indiana citizens. This Court held the class action decree binding on all members of the class, including absent members who were Indiana citizens and hence not diverse from the defendants.

Significantly, the subject of the action in *Ben-Hur* was "the control and disposition of the funds of a beneficial organization," a dispute cognizable in equity, which could be prosecuted only if all interested persons were before the court. *Id.* at 366–67. This Court ruled that, as the Indiana class members could have intervened in the class action under the doctrine of ancillary jurisdiction, their common citizenship with the defendants was no bar. As Equity Rule 38 did not permit the bringing together of a large number of individual tort claims into a single class action, *Ben-Hur* does not stand for the proposition that complete diversity may be waived in such cases. And, indeed, prior to 1938, it could not.

The 1938 Federal Rule 23. When the Federal Rules were proposed in 1936, the Preliminary Draft contained no separate class-action rule. *See* Moore, *Federal Rules of Civil Procedure*, 25 Geo. L.J. 551, 570 (1937). Such a rule was proposed by Professor Moore, *see Id.* at 571, and Rule 23(a) as promulgated was his language. The 1938 Rule 23 provided for three types of class actions,

true, hybrid, and spurious, depending on whether the character of the rights sought to be enforced for or against the class was:

> 1. joint, or common, or secondary in the sense that the owner of a primary right refuse to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> 2. several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> 3. several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

While 23(a)(1) and 23(a)(2) class actions—the "true" and the "hybrid"—were recognizable restatements of Equity Rule 38, 23(a)(3)—the "spurious" class action was admittedly new.

Moore explained that the spurious class action "is a permissible joinder device," pure and simple. 2 Moore, *Federal Practice* 2241 (1938). As the 1938 Federal Rules 18 and 20 in fact embodied liberal permissive joinder rules, Moore had another purpose in mind: to evade the jurisdictional requirement of federal court suits and most particularly the complete diversity requirement of 28 U.S.C. § 1332 and *Strawbridge*. Indeed, Moore was quite candid:

> [I]n the federal courts where there must be complete diversity between all of the plaintiffs on the one side and all of the defendants on the other, ... the spurious class action can be justified in federal procedure. Once jurisdiction attaches the action would not be defeated by interventions, hence, the class action offers the possibility of clearing up a litigious situation.

Moore, *Federal Rules of Civil Procedure*, 25 Geo. L.J. 551, 557 (1937). While it was then clear that in cases of permissive joinder each party needed to satisfy federal jurisdiction requirements independently, *Pinel v. Pinel*, 240 U.S. 594 (1916); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), Moore urged that in a spurious class action only the named representatives need meet those re-

quirements. 2 Moore, *Federal Practice*, 2245, 2295, 2412 (1938). Moore cited no authority for that proposition, not even *Ben-Hur*, apparently recognizing that *Ben-Hur* was a true and not a spurious class action.

Professors Kalven and Rosenberg, after summarizing Professor Moore's candid intent, stated that the spurious class action "functions exclusively as a trick for obtaining federal jurisdiction". Indeed, they termed it "absurd," having "no function" except to manufacture federal jurisdiction. Kalven & Rosenberg, *Functions of Class Suit*, 8 Chi. 684, 704 (1941). Professors Hart and Weschler agreed, calling Moore's ploy "so bold an enlargement of federal jurisdiction." Hart and Weschler, *Federal Courts and Federal System* at 937 (1953). Professor Wright in 1963 called it "a major extension of federal jurisdiction." Wright, *Law of Federal Courts* § 72, at 472 (1st ed. 1963).[4] Moore's attempt to expand federal jurisdiction through Rule 23 was rejected by at least three circuits. *Hackner v. Guaranty Trust Co. of New York*, 117 F.2d 95 (2d Cir. 1941); *Steele v. Guaranty Trust Co. of New York*, 164 F.2d 387 (2d Cir. 1947); *Knowles v. War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948); *Farmers Co-op Oil Co. v. Socony Vacuum Oil Co.*, 133 F.2d 101, 104–05 (8th Cir. 1942).

Thus, the 1938 Rules created the spurious class action as a permissive joinder device. Professor Moore candidly advocated its use to expand federal subject-matter jurisdiction. Commentators recognized it for what it was. Three federal circuits rejected the effort. A few courts, without analysis, followed Moore. This Court did not rule.

The 1966 Rule 23. The 1966 amendment does away with the true, hybrid, and spurious categories, putting in their place 23(b)(1), (b)(2), and (b)(3), abandoning the opt-in intervention

[4] The first case that adopted Moore's view was *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (W.D. Pa. 1947). It cited *solely* Moore's 1938 work for authority. In return, *Shipley* became the *only* authority cited by Moore's next edition, 3 Moore *Federal Practice* 3477 (2d ed. 1948). *Shipley*, in turn, was used as authority without analysis by *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956).

approach of the 1938 Rule, and replacing it with an opt-out provision applicable to (b)(3) class actions. The issue in this case is whether the 1966 amendment expanded federal subject-matter jurisdiction. Stated in those terms, the answer must be no, for clearly the Rules cannot expand jurisdiction. Fed. R. Civ. P. 82. As applied to class actions, we can have only the same exceptions to the complete diversity requirement of 28 U.S.C. § 1332 that we had before 1938. And, as the history has shown, that was clearly limited to the "true" and "hybrid" class actions that existed before 1938.

However, there is a problem: *dicta* in *Snyder v. Harris*, 394 U.S. 332 (1969). *Snyder*, a class action for money damages for each class member, would not have been a true or hybrid class action before 1966, and certainly not before 1938. The issue was solely whether the named representatives of the class need meet the jurisdictional amount requirement of 28 U.S.C. § 1332. This Court held that each named representative was required to have over $10,000 in controversy. But in *dicta*, Justice Black stated:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no non-diverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant .... *See Supreme Tribe of Ben-Hur v. Cauble* .....

394 U.S. at 340. Justice Black failed to note that *Ben-Hur* was a "true" class action, in which control of a *res* was being litigated, while *Snyder* was a suit for damages for each class member. Prior to the instant case, the *Snyder dicta* was the basis of holdings or *dicta* in several circuit and district court cases.[5] At least one court

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[5] *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974) *(dicta); Friedman v. Meyers*, 482 F.2d 435, 436 n.1 (2d Cir. 1973) *(dicta); Caspar v. Cunard Lines*, 560 F.Supp. 240, 242 (E.D. Pa. 1983) *(dicta); Rocket Oil & Gas Co. v. Arkla Explor.*, 435 F. Supp. 1303 (W.D. Okla. 1977); *In re Dalkon Shield IUD Products*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo.) *vacated on other grounds*, 680 F.2d 1175 (8th Cir. 1982).

has disagreed, rejecting the *Snyder dicta*.[6]

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court, building upon the holding of *Snyder*, held that each member of a plaintiff class must meet the jurisdictional amount requirement of Section 1332. This holding led Professor Moore to change his view, so that now he too rejects the *dicta* of *Snyder*:

> In *Zahn* ... the diversity class suit may have been dealt a death blow ... [T]he Court held that the claim of each member of the class must satisfy the jurisdictional amount. Since the claims of the members of a (b)(3)-type class are not within the court's ancillary jurisdiction of the jurisdictional amount requirement, it should follow that they are not ancillary for diversity purposes and the citizenship of each member of the class must be considered.

Moore, *Federal Practice* (Rules Pamphlet), § 23.17, pp. 241–42 (1987).[7]

The Agent Orange Decision. In the instant case, the Court of Appeals held that, in a 23(b)(3) class action, complete diversity is not required between all members of the class and the opposing parties, relying upon the *dicta* in *Snyder*, which it termed "hornbook law." 818 F.2d at 162. (App. p. 710a.) The Second Circuit ignored the distinctions between the "true" class action that existed in *Ben-Hur* and the permissive-joinder type of class action in the instant case. The court also ignored the argument that looking only to the citizenship of the named representatives in the permissive-joinder type of class action, it was working an expansion of federal jurisdiction through changes in the Federal Rules.

The Reason for Granting Certiorari. The instant case represents a marked departure from the heretofore settled doctrine that

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[6] *People v. Hunt Int'l.*, 481 F. Supp. 71 (N.D. Ill. 1979).

[7] Professor Moore goes on: "thus, *Zahn*, *sub silentio*, overruled *Supreme Tribe v. Cauble* .... *Zahn* also cast doubt on the rule that intervention in a class action, over which the court has jurisdiction, does not require independent grounds of federal jurisdiction." *Id.* at 242.

a federal rule may not be used to expand federal jurisdiction beyond that permitted by statute. Complete diversity is a requirement of 28 U.S.C. § 1332. *State Farm*, 386 U.S. 523 (1967). The exceptions are narrow and restricted to those in existence in 1938. That they are not to be expanded or added to has been made very clear by this Court in *Owen Equipment*, 437 U.S. at 377:

> [N]either the convenience of litigants nor considerations of judicial economy can suffice to justify extension of ancillary jurisdiction to plaintiff's cause of action against a citizen of the same state in a diversity case. .... To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.

The holding in the instant case, adopting the *dicta* of *Snyder*, will open up a large area of federal jurisdiction that did not exist before. As many of these cases will be massive, they will deprive state courts of, and place in federal courts, large segments of jurisdiction not intended by Congress. The problem began with Professor Moore. Professor Moore has abandoned his earlier position. But meanwhile that position was placed into the *dicta* of this Court in *Snyder*. As this Court knows, the *dicta* of the Supreme Court of the United States, even when inconsistent with holdings in other cases (here *Zahn* and *Owen Equipment*), has vast impact among the federal courts. It must be the role of this Court to reexamine its own *dicta*, translated into holding in this and other cases cited above.

The facts in this case are illustrative of the charade that results from the holding of the Second Circuit. This case began as 145 individual actions containing some 15,000 named plaintiffs, all transferred to one court under the Multidistrict Litigation Statute. Some contained class action allegations. By the time of the Third Amended Verified Complaint, the lead case complaint contained no diversity allegations. Then it was determined that the case could be brought only under diversity jurisdiction. 635 F.2d at 995. (App. p. 641a) The district court then ruled that each of the 145 complaints were to be deemed amended to add diversity allegations

and, in each complaint, to name only those defendants who were of diverse citizenship from the plaintiffs named in that complaint.

Prior to the January 16, 1984 class-certification order, the trial judge asked for a list of named plaintiffs to be representatives of the class in the certified class action. The PMC named eleven veterans and family members. That the PMC recognized that arbitrarily selecting a few named plaintiffs in order to create diversity is no more than a charade can be seen from the fact that among the eleven there were four who were not diverse from the citizenship of four of the defendants. Through various amendments, the number of named plaintiffs was reduced to four arbitrarily selected from the entire class.

Thus, the case proceeded. It is clear that the case would have proceeded no differently if the names of any four alternative class members had been typed on the later Amended Complaints: it was a charade to satisfy Moore's ploy (since abandoned even by Moore) and the *dicta* of *Snyder*. In spirit, if not in letter, this violates the command of 28 U.S.C. § 1359.

B. The Court of Appeals Expanded Federal Jurisdiction by Permitting a Diversity Class Action to Proceed with Named Plaintiffs Who Were Nondiverse from Defendants

If, *arguendo*, it is to be assumed that in a permissive joinder type of class action, the citizenship of only the class representatives is to be considered, the courts below have still worked an expansion of federal diversity jurisdiction beyond that permitted by previous law. In the process the Court of Appeals has vitiated Fed. R. Civ. P. 54(b).

As described above, the first class action complaint contained 10 named representatives. Three of those 10 were of the same citizenship as three defendants: Michael Ryan and Hooker Chemical, both of New York; Brian Quinn and Riverdale Chemical, both of Illinois; Dan Jordan and Diamond Shamrock, both of Texas.

In February 1982, the trial court granted Hooker's motion for summary judgement, on the ground that Hooker did not manufac-

ture Agent Orange, and therefore was not guilty of the allegations against it. *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1052 (E.D.N.Y. 1982). (App. p. 76a.) As no Rule 54(b) certificate as to Hooker was ever made by the trial judge, the February 1982 order remained interlocutory and Hooker a defendant throughout the subsequent proceedings. On February 17, 1984, after the class-action certification, there is a clerk's docket entry of dismissal of Hooker, referring back to the February 1982 order. However, no "express determination" called for by Rule 54(b) was made. Even if the Rule 54(b) "express determination" had been made in February 1984, the result would be no different, as Michael Ryan and Hooker coexisted as nondiverse parties for one month and then an attempt was made to dispose of the claim against Hooker on its merits.

The trial court granted summary judgment for Riverdale on May 20, 1983. *In re "Agent Orange" Product Liability Litigation*, 565 F.Supp. 1263, 1271 (E.D.N.Y. 1983). (App. p. 120a.) On December 13, 1983, the court ordered the clerk "to enter judgment, forthwith, dismissing action as to deft....Riverdale Chem. Co." No "express determination" under Rule 54(b) was made.

Rule 54(b) provides, in pertinent part, that when the trial court disposes of one or more but fewer than all parties before it, the court may direct the entry of a final judgment" as to those parties disposed of but "only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." In the absence of that "express determination" and "express direction," the order, "however designated," does not terminate the action as to those parties and the order is interlocutory, "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Id.*

This language was not accidental. As adopted in 1938, Rule 54(b) contained no express certification requirement. Wright & Miller, § 2653 at 20. The result was confusion as to what was a final order under that rule. To eliminate this confusion, Rule 54(b) was amended in 1948 to require the "express determination" and

"express direction" now in the rule. *Dickinson v. Mulligan*, 338 U.S. 507, 512 (1950); Wright & Miller, § 2653 at 21. Absent the "express determination" and the "express direction" required by Rule 54(b), an order, "even if it appears to adjudicate a separable portion of the controversy, is interlocutory." Wright & Miller, § 2653 at 38. Thus, express findings are an "essential prerequisite" to finality, *Encoder Communications Inc. v. Telegen, Inc.*, 654 F.2d 198 (2d Cir. 1981); Wright & Miller, § 2653 at 14–16, and the order is subject to revision at any time prior to final judgment in the case. *Republic of China v. American Express Co., Inc.*, 190 F.2d 334, 339 (2d Cir. 1951).

That the district judge in the instant case understood the law exactly this way is clear from his actions. For summary judgment granted to Thompson Chemical Company on May 20, 1983, without a certificate that met the Rule 54(b) requirement, 565 F.Supp. at 1271, was revoked on November 14, 1983. In the instant case, the Court of Appeals disposed of the argument that complete diversity was missing between all representative plaintiffs and Hooker and Riverdale by holding that, "[b]ecause the purpose of the rule is ... only to clarify the appealability of an order, a dismissed defendant who fails to obtain a Rule 54(b) certification does not remain a party of the case for purposes of determining diversity." *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145, 162-163 (1987). (App. p. 712a.)

The language in Rule 54(b) that, without such a certificate, the order may be revised "at any time before the entry of judgment adjudicating all the claims and the rights and liability of all the parties," is ignored. The fact that the district judge in this case entered summary judgment for one defendant which, in the absence of a proper 54(b) certificate, he later revoked is also ignored.

With much respect, we are left under the holding of the court below with the absurd result that a person is a party in a district court case for appellate jurisdiction purposes (i.e., he may not appeal without a proper Rule 54(b) certificate), but he is not a party for diversity purposes. Moreover, this nonparty (for jurisdictional purposes) may be made a party again by the trial court revising its

earlier interlocutory order. Clearly, the line between final and interlocutory order is clouded, all in an attempt to expand federal diversity jurisdiction. Once again, to preserve the lines drawn by Congress under the law as heretofore understood and under its reasoned application, this Court's intervention is required.

II. THE NOTICE ORDERED IN THIS 23(b)(3) CLASS ACTION DID NOT SATISFY DUE PROCESS OR RULE 23(c); EVEN THE INADEQUATE NOTICE ORDERED WAS NOT CARRIED OUT.

A. The Notice Ordered Did Not Satisfy Due Process and the Notice Requirements of Rule 23(c)

Mullane v. Central Hanover Bank, 339 U.S.306 (1950), sets forth the basic constitutional test for notice that Rule 23(c)(2) picks up for 23(b)(3) class actions: "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id.* at 314–20. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), applies those principles in a case on all fours with the instant case. *Mullane* and *Phillips Petroleum* require more than was ordered in the instant case.[8]

Mullane involved settlement of an account by the trustee of a common trust fund and the notice to be given to the fund's beneficiaries. Every claim that the beneficiaries would otherwise have against the trustee for improper management of the common fund during the period covered would be "wholly terminated by the decree" to be entered. 339 U.S. at 311. The notice given, this

[8] The PMC admitted that class certification notice was defective. Thomas Henderson, a member of the PMC, told the district court: "There were, I believe, at least seven significant factors which bore on our decision to settle this case .... The seven problems were the propriety of the class notice, having sent out approximately 170 odd thousand notices to perhaps as many as 2.4 million class members, with some of the possible technical deficiencies in the timing of the mailing of notices as the Court has pointed out from time to time." We submit that settling a class action because class counsel gave inadequate notice is both improper and a clear violation of due process and Rule 23(c) (2).

Court held, must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and to afford them an opportunity to be heard. *Id.* at 314. But the particular type of notice constitutionally required varies "with due regard for the practicalities and peculiarities of the case ...." *Id.*

The circumstances emphasized in *Mullane* are crucial to an understanding of the application of the *Mullane* standard to this case:

> The individual interest [of any one beneficiary] does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interest of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

Id. at 319.

That is not this case. Here every claimant has an individual claim of his own. No claimant will put forward a fight for the claims of those absent. At the end of the case, those claimants who are victorious will claim their own without concern for those who received no notice. And, of course, no claimant before the court would or could exercise the opt-out right provided by Rule 23(c)(2) on behalf of absent class members, including those who received no notice.[9] Thus, in this narrow, but very important regard, a crucial ingredient of *Mullane* is missing: "the notice" that reached some, "is [not] likely to safeguard the interest of all"; the "rights of each ... are [not] shared by many other[s]." 339 U.S. at 319.

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[9] "[M]embers of the class in (b) (3) actions must be given the option of excluding themselves form the class and from any ensuing judgment." *In re Glenn W. Turner Enterprises, Ltd.*, 521 F.2d 775, 781 (3d Cir. 1975). This requirement has been held to have a constitutional basis. *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977).

For reasons developed *infra*, the record in this case is replete with the names of claimants who did not in fact receive notice before the opt-out period expired and, indeed, of claimants who were not even aware of their injuries until after that date. Those persons could not opt-out if they had wanted to; their option was completely foreclosed. And no one before the court could exercise this right for them.

Because this is not *Mullane*, the notice requirement itself must be different. Where there is not the identity of interest that existed in *Mullane*, nothing short of actual notice to a person who is or with due diligence knows that he has been injured will suffice. And that actual notice must give sufficient time to exercise all rights, including the right to opt-out.[10]

Rule 23(c)(2) embodies the language and the concept of *Mullane*. But due process and Rule 23(c)(2) interests can be protected only if each member of the class receives notice that is sufficiently clear and in sufficient time to permit an intelligent decision on whether to opt-out of the class action or to remain in and be bound by the result:

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ... or, whether conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring notice than other of the feasible and customary substitutes.

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[10] There are cases that provide for less than actual notice. We submit, they are based upon a rote repetition of the language of the Rule and of *Mullane* without any hard analysis whether the peculiar circumstances are the same as those in *Mullane*. As far as they hold that the particular notice method of *Mullane* is applicable to all circumstances, no matter how different from those of *Mullane*, we respectfully urge they are wrong. Due process requires more.

Mullane, 339 U.S. at 315. Publication in newspapers may provide unidentified class members notice. But this Court has made clear that "[n]otice by publication is a poor and sometimes hopeless substitute for actual service of notice," and that "[i]ts justification is difficult at best." *Schroeder v. City of New York,* 371 U.S. 208, 213 (1962).

The holdings of the courts below concerning notice run directly contrary to *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Phillips,* this Court applied *Mullane* to an action for money damages on behalf of a plaintiff class where many members of the class were not appearing voluntarily.[11] First, this Court held that due process required that the members of that class "*must receive notice* plus an opportunity to be heard and participate in the litigation." *Id.* at 812 (emphasis added). Second, "The notice should describe the action and the plaintiff's rights in it." *Id.* Third, due process was held to require "at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court." *Id.* Finally, due process required that "the named plaintiff at all times adequately represent the interests of the absent class members." *Id.*

None of those requirements were met in this case. The class representatives failed to identify class members who could have been identified through a reasonable effort. Written individual notice was not sent to 177,496 class members whose names and addresses were in the hands of the class representatives. Clearly, they did not "receive" notice, as is required by *Phillips*. Further, many class members received notice *after* the time to opt-out expired – thus, effectively depriving them of the right to opt-out. Manifestly, the bare "minimum" requirement of due process "that an absent plaintiff be provided with an opportunity to remove himself from the class," *Phillips*, 472 U.S. at 812, was not met.

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[11] This Court limited its holding in *Phillips* to a class action seeking money damages on behalf of class members. 474 U.S. at 811-12, n.3. That, of course, *is* the instant case.

Another important consideration is the widespread dispersion of these class members throughout the United States, Puerto Rico, and in Australia and New Zealand. They came from every type of background. The only factor that they had in common was that they were all veterans of Vietnam service or related to veterans who had served there. They were part of a larger group, consisting of some 2,400,000 who had performed such service. The United States government had the names and addresses of a high percentage of the 2,400,000, but otherwise a comprehensive list did not exist.

The most certain method of reaching all or almost all class members was to send a letter to each person who had served in Vietnam during the critical years. The court's order in this case fell far short of that mark. The court ordered notice to be mailed to each of the following persons:

> (a) Each plaintiff or intervenor in the cases before the court, some 14–15,000 persons, plus any person represented by a counsel on the PMC who was not a named party.
> (b) Each person on the Veterans Administration registry who had complained of an Agent Orange related ailment, some 89,000 persons.
> (c) Each state governor, asking that the notice be sent to any person known to a state agency who may be a member of the class and inviting each governor to supply the court with a list of names and addresses so that notice could be mailed to those persons by the PMC.

597 F. Supp. at 756. (App. p. 165a.) In addition, the court ordered publication:

> (d) Once a week for two successive weeks (or, if the publication is monthly, then once) in: *USA Today; New York Times* (national edition); *Time Magazine*; the ten largest circulation newspapers in Australia; the five largest daily circulation newspapers in New Zealand; *American Legion Magazine*; *VFW Magazine*; *Air Force Times; Army Times; Navy Times;* the *Leatherneck*.

Id. Notices were also to be sent to television and radio networks and to radio stations with a combined coverage of at least 50% of the listener audience in each of the top 100 radio markets in the United States, asking for free, public service announcements.

This litany is just not designed to reach all or even almost all of the class members. Limiting the print notice to these three publications is far from a demonstration of seriousness. It is common knowledge that vast numbers of the members of this class — in common with the vast majority of Americans — do not read the *New York Times* (national edition), *USA Today,* or *Time Magazine*, and vast numbers of them do not belong to the old-line veterans groups so as to receive the two veterans magazines listed. To limit the print notice to these publications was to guarantee the futility of result. And limiting the radio and television broadcasts to public service announcements ensured a lack of effectiveness.

B. The Notice Ordered Was Not Given and the Time Contemplated Was Not There

Even the inadequate notice ordered was not given before the May 1, 1984 opt-out deadline:

1. *New York Times* (national edition) — no notice prior to May 1, 1984. However, *New York Times* (local edition), notice appeared once, April 17, 1984.
2. *USA Today* — no notice appeared prior to May 1, 1984.
3. *Time Magazine* — no notice appeared prior to May 1, 1984.
4. *American Legion Magazine, VFW Magazine, Army Times, Navy Times, Air Force Times, The Leatherneck* — no notice appeared prior to May 1, 1984.
5. Television and radio networks — the record contains no certificates showing any broadcast and none is known to counsel.
6. Radio stations: of approximately 9,000 radio stations in the United States, the record contains certificates showing broadcasts by 37 radio stations. Of those, only

> 4 were among the top 10 in coverage in their respective geographic regions. Broadcasts occured in only 22 of the 100 *major* radio markets.

The mailed notice was also not carried out as ordered. 187,600 notices were mailed. 57,000 were returned undelivered. The notices to the governors received a varying response.

These facts speak for themselves. The court's order for publication was not carried out. That in itself is a sufficient denial of due process and the rights under Rule 23(c)(2). And those denials deprived class members of important rights recognized in *Mullane* that could not be claimed because notice was not given. Those denials cannot be justified on the ground of efficiency.

C. Individual Notice to Identifiable Class Members Was Required and Was Feasible

Rule 23(c)(2) requires that 23(b)(3) class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." This Court has made it clear that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is rather, an unambiguous requirement to Rule 23." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) ("*Eisen IV*").[12] Moreover, this Court in *Phillips* made clear that due process requires that members of a plaintiffs' class action for money damages "receive" this notice. *Phillips*, 472 U.S. at 812.

In re Nissan Motor Corp. Antitrust Lit., 552 F.2d 1088, 1098–99 (5th Cir. 1977), describes "reasonable efforts":

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[12] In *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), a class action involving DES claims, the court concluded that due process required "actual receipt of notice before a judgment may bind class members," because [t]he stakes in this action are high. Women who do opt-out will be bound by the judgment that results. Class members who later develop cancer may be barred by the judgment in this action from seeking compensation for their subsequent injury." *Id.* at 393.

> [S]ubdivision (c)(2)'s reasonable effort standard requires that, once a 23 (b)(3) action has been certified, the name and last known address of each class member known to the parties or capable of being identified from business or public records available to them must be produced. The source or sources providing the greatest number of names and addresses must be used.[13]

The responsibility of identifying absentee class members and paying the cost of their individual notice is that of the representative plaintiffs. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356 (1978); *Nissan*, 552 F.2d at 1102. A class action must be dismissed where the representative plaintiffs are unwilling or unable to undertake the identification and notice process and to bear the cost. *Eisen IV*, 417 U.S. at 179. As this Court said in Eisen, "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 176.

The best source of names and address of those injured through Agent Orange exposure is the list of those who served in Vietnam. All parties below agreed on that fact. That list was in the hands of the federal government. The class representatives could have obtained that list by its own efforts or by reimbursing the Government for the cost of furnishing the list. The fact is that it was feasible to identify all, or most of, the 2,400,000 persons who had served in Vietnam. That it would have taken effort and expense on the part of the class representatives is no excuse. Due process and Rule 23(c)(2) require no less. *See Phillips; Eisen IV; Nissan.*

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[13] The representative plaintiffs in *Nissan* were required to review *manually* 1,700,000 "retail delivery report cards" to obtain the names and last known addresses of approximately 371,000 persons who had purchased motor vehicles. "A large class requires a large effort . . . . While the mechanical process of examining [1,700,000 RDR cards] may prove to be expensive and time consuming, the individual right of absentee class members to due process makes the cost and effort reasonable." *Id.* at 1100; *see also Eisen IV*, 417 U.S. at 179; *In re Franklin Nat'l Bank Sec. Litig.* 574 F.2d 662, *modified on other grounds*, 599 F.2d 1109 (2d Cir. 1978).

Even more egregious, names and addresses of class members furnished to the class representatives were not used. At the request of the trial court. Massachusetts furnished some 157,496 names; no notices were mailed to those persons. West Virginia furnished 28,000 names; no notices were mailed to 20,000 of those persons. Moreover, one-third of all notices actually sent were returned undelivered. The reasons were many: computer gliches, old addresses, etc. When those errors were discovered, the class representative failed to correct them, and tens of thousands of class members received no notice.

The class representatives' inability to carry out the fundamental due-process burden placed on them demonstrates the inadequacy of their representation of absent members and requires decertification of the class. *See Eisen IV; Nissan; Oppenheimer.*

D. The Decision of the Court of Appeals

The Court of Appeals noted that 240,000 claims had been filed to conclude that the notice was adequate. 818 F.2d at 169. (App. p. 727a). Moreover, the court found that the trial judge acted within his discretion in not ordering that notice be sent to the 2,400,000 names possessed by the Department of Defense, names and addresses that could have been obtained through the expenditure of time and money. *Id.* (App. p. 726-27a). The appellate court held that the 2,400,000 names was unnecessary, since that list included names of Vietnam veterans who had not been exposed to Agent Orange. *Id.* Finally, the court held that since the interests of all veterans in the facts and law going to the military-contractor defense were identical, "the class members with actual notice . . . would have represented the interests of the class members unaware of the action." *Id.* at 168-169 (App. p. 726a).

The court held it to be immaterial that the trial court's order on notice was not followed. *Id.* at 169 (App. p. 728a). That a "large number of mailed notices were returned undelivered ... must be regarded as inevitable ... in litigation of this sort." *Id.* The court also recognized that class counsel had failed to carry out the trial judge's order concerning publication and broadcast notice, but held

this to be a "clerical error . . . of little consequence in light of the actual notice and widespread publicity" that the case received. *Id.*

E. Further Reasons for This Court to Grant Review

Once again, the appellate court permits a clear violation of settled law on the ground that in this massive case it really does not matter. The appellate court looks to the fact that 240,000 claims were actually filed — without noting that the vast majority were filed *after* the opt-out period had expired and publicity was given to the $180,000,000 settlement. The appellate court overlooks the fact that actual notices were not sent to several tens of thousands of names and addresses in the hands of class counsel and that when 57,000 notices were returned undelivered no attempt whatsoever was made to remedy the situation. The court finds acceptable that there were some 130,000 notices sent out and not returned while the class counsel had in hand some 177,500 other names and addresses to whom no notice was sent. The appellate court excuses the failure to furnish publication notice as a "clerical misunderstanding." *Id.* at 169 (App. p. 728a). While the court judicially notes the publicity received for this case, it fails to differentiate how much of that publicity was after the settlement. It also fails to focus on the evidence before it of many persons who did not receive notice until after the opt-out period expired.

Thus, once again, the appellate court has acted on the basis of efficiency. In this massive case, due process, the requirements of Rule 23(c)(2), the law as laid down in *Mullane* and *Phillips Petroleum* must bow to efficiency. The fact that many tens of thousands of claims were wiped out without any notice was immaterial to the court of appeals. Perhaps the most telling statement was the appellate court's declaration that "given the great doubt as to whether anyone at all was injured by Agent Orange," it did not matter who, if anyone, received notice. 818 F.2d at 169. We respectfully suggest that this is a notion of due process foreign to our legal system and one which, if uncorrected by this Court, can expect to receive increased credence in future cases that prove troublesome to the efficient operation of the courts. Moreover, the

holding of the courts below that class counsel does not have the obligation to proceed with notifying a large group of individual names that exists and can be accessed with time and money is in direct conflict with the ruling of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977).

III. THE EXERCISE OF JURISDICTION OVER INDIVIDUAL CLAIMS FROM THROUGHOUT THE COUNTRY, AND EVEN BEYOND OUR SOVEREIGN BOUNDARIES, VIOLATES DUE PROCESS AND THE POWER OF THE COURT AS GRANTED BY CONGRESS WHERE THE INDIVIDUAL CLAIMANTS HAVE NO CONTACT WITH THE FORUM STATE.

Due process requirements for the exercise of judicial power over an unwilling party were laid down in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and put into their current form in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As this Court made clear in *Phillips Petroleum*, "the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest ...." 472 U.S. at 807.

While the personal jurisdiction principles are generally considered in terms of a defendant who does not desire to be sued in a particular location, this Court in *Phillips* made clear that they apply equally to involuntary class-action plaintiffs.

The instant case arose in a federal court and the *International Shoe* principles were generally developed in cases arising in state court. However, they have been equally applied in cases arising in federal court. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Moreover, the liberty interest of the Due Process Clause underpinning personal jurisdiction, *see Phillips*, 472 U.S. at 807, apply in federal as well as in state court. Thus, all of the considerations of "traditional notions of fair play and substantial justice" that permeate *International Shoe* and its progeny and that underlie the requirements laid down in *Phillips* for involuntary plaintiff class actions are as applicable in federal court as in state court.

See also Arrowsmith v. United Press Int'l., 320 F.2d 219 (2d Cir. 1963).

In the instant case, the exercise of personal jurisdiction over involuntary plaintiffs without the protections that *Phillips* sets down "as a minimum" flies in the face of this Court's holding. *Phillips* was argued to the Court of Appeals below and ignored. Further review by this Court is called for.

Moreover, the actions of the courts below invade an area in which Congress has been the prime actor. In every instance in which nationwide personal jurisdiction exists, it is provided by an Act of Congress.[14] The only example of federal court personal jurisdiction over an unwilling party outside of the state in which the federal court is sitting, in the absence of statute, is the very limited 100-mile bulge provision of Rule 4(f).

In the instant case, the Court of Appeals rejected the personal jurisdiction argument. The appellate court recognized the truism that Congress has the authority to legislate nationwide jurisdiction for the federal courts. *See Mississippi Publishing Corp. v. Murphree*,326 U.S. 438, 442 (1946). The appellate court then pointed to the Multidistrict Litigation Statute, 28 U.S.C. § 1407, as a statute that authorized nationwide jurisdiction in this case.

The appellate court's reasoning does not make sense. Clearly, cases already properly filed in federal court may be gathered in one federal district under Section 1407. But that statute does not purport to authorize gathering into a class action an involuntary plaintiff who filed a case in state court, who has not yet filed a case, or whose injury has not yet manifested itself.

Once again, it must be recognized that prior to 1966 this case could not have been brought. The pre-1966 class action rule provided for opt-in plaintiffs with individual claims. Thus, the involuntary plaintiff could not have been swept across country into a class action that would determine his individual claim without his consent. It is only the restructuring of Rule 23 in 1966 that made

[14] *E.g.*, Investment Company Act, 15 U.S.C. § 80a–43 and The Interpleader Act, 28 U.S.C. § 2361; 28 U.S.C. § 1655.

this case possible. Nowhere does the Advisory Committee note an intent to sweep away previous limitations on the exercise of personal jurisdiction. Nor is there discussion of whether Congress delegated to the courts the power to do what Congress had always done before: create nationwide personal jurisdiction.

Thus, it is manifest that the action of the courts below in exercising personal jurisdiction over the claims of individuals thousands of miles away, without any semblance of contact with New York, is a usurpation of power not authorized by Rule 23 or by Rule 4(f). As far as Rule 23 may be read to go that far, it falls outside of the rule-making power. While the result may be efficient, it is a usurpation of Congressional power.

CONCLUSION

In reaching an efficient result to a very difficult problem, the courts below swept aside significant restrictions on the power of federal courts, ignored holdings of this Court, and made a mockery of due process principles. While the case in many ways is *sui generis*, the principles are not. With the *impermatur* of the United States Court of Appeals for the Second Circuit behind them in this highly visible case, the holdings of the instant case can be expected to be followed, with minimum analysis, by other courts seeking an efficient result. Thus, we respectfully urge, further review by this Court is essential and the Petition should be granted.

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Respectfully submitted,

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STATUTORY AND RULE APPENDIX

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States:

(2) citizens of a State, and citizens and subjects of a foreign state;

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

§1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrail depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(1) the judicial panel on multidistrict litigation upon its own initiative, or

(2) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review or an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Anti-trust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Rule 4. Process

. . . .

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized

by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragrpahs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be

dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicably after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The

notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the occur may direct to some or all members of any step in the action, or of the proposed extent of the judgement, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with

similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§1391-93.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.